WILSON PARKING (M) SDN BHD

v.

JW MARRIOTT HOTEL, KUALA LUMPUR & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ZURA YAHYA JC
[SUIT NO: S4-22-784-2000]
21 JUNE 2010

CONTRACT: *Agreement - Car Park Management Agreement - Wrongful eviction of plaintiff from managing car park in hotel - Allegation of - Whether second defendant bound by terms of the contract between plaintiff and first defendant - Whether agreement a positive covenant - Whether could be enforced on second defendant - Whether there was privity of contract - Whether person could not be made liable upon a contract unless he was a party to it*

The plaintiff's claim herein was against the second defendant for the wrongful eviction of the plaintiff from managing the car park in the hotel, JW Marriott Hotel ('the Hotel'). Briefly, the plaintiff had entered into a Car Park Management Agreement dated 15 August 1998 (the management agreement) with the Hotel to manage, control and operate the Hotel's car park for three years commencing from 1 August 1998 until 31 July 2001 and be paid a fixed monthly sum of RM18,000 and also an incentive payment equivalent to 1% of the monthly net operating proceeds received from the Hotel's car park. However, on 20 October 1998, the second defendant purchased the Hotel Property from Crescent Hotels Sdn Bhd (CHSB) as beneficial owner of the Hotel Property and Punca Makmur Sdn Bhd (PMSB) as the registered owner of the Hotel Property. The second defendant by letter dated 16 June 1999 gave notice to the plaintiff to vacate and handover the Hotel's car park within 14 days on or before 30 June 1999. It was the plaintiff's claim that the second defendant was bound by the management agreement and relied on cl. 18(iv) of the management agreement. According to the plaintiff, the second defendant had notice of the plaintiff's occupation and management of the Hotel's car park prior to their purchase of the Hotel Property, and the second defendant by their conduct had accepted that they were bound by the management agreement and thus estopped from denying they were not bound by it.

Held (dismissing plaintiff's claim with costs):

(1) PW1's evidence that cl. 18(iv) was inserted by mutual agreement between the plaintiff and the first defendant in order to bind subsequent owners who purchased the Hotel could not be accepted as evidence of the meaning of the said clause. There was no evidence that CHSB/PMSB had discussions with the plaintiff on this. Further, the management agreement was an agreement by the plaintiff to provide services to manage and operate the car park at the Hotel. It was not a tenancy agreement. The management agreement did not accord or confer upon the plaintiff any rights of exclusive possession or any rights whatsoever over the Hotel Property. The rights of the plaintiff were purely contractual and the contract was entered into with CHSB/PMSB and not the second defendant. Thus the words 'successor-in-title' in cl. 18(iv) could not be interpreted in the same manner as it would be interpreted if the said clause was found in a sale and purchase of land or property or in a tenancy agreement. The management agreement ought to be construed as a covenant that did not touch or concern the land and it was not to be regarded as conferring any form of proprietary or possessory rights over the Hotel Property. (paras 8-10)

(2) The second defendant did not purchase the Hotel Property from CHSB/PMSB subject to the management agreement. There was also never any agreement that the second defendant would assume the obligations of CHSB/PMSB under the said sale and purchase agreement. Thus the second defendant could not be bound by the terms of the contract which they never entered into or had agreed to be bound by. Further, the three months' delay in issuing the notice to vacate could not be taken to be that the second defendant was estopped from saying that they were not bound by the management agreement. (paras 14 & 16)

(3) The management agreement was a positive covenant since it compelled the contracting party to allow the plaintiff to exercise certain rights over the Hotel Property and obliged the contracting party to make payments to the plaintiff for services rendered. Being a positive covenant it could not be enforced on the second defendant because there was no privity of contract between the plaintiff and the second defendant. To enforce the management agreement on the second defendant would

tantamount to enforcing an obligation against them who had not covenanted to do so. This would contradict the common law rule that a person could not be made liable upon a contract unless he was a party to it. Therefore, the second defendant was not bound by the terms and conditions of the management agreement between the plaintiff and the hotel. The plaintiff was thus not wrongly evicted from managing the Hotel Car Park. (para 24)

Case(s) referred to:
Rhone And Another v. Stephens [1994] 2 All ER 65 ***(refd)***

For the plaintiff - Loo Peh Fern (Ng Chian Huey with her); M/s Skrine
For the 2nd defendant - Brendon Navin Siva (Aida Haryani with him); M/s Kadir, Andri & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Zura Yahya JC:

[1] The plaintiff's claim against the 2nd defendant is for the wrongful eviction of the plaintiff from managing the car park in the hotel known as JW Marriott Hotel (the hotel).

[2] The other defendants named by the plaintiff in the writ of summons and statement of claim have been struck out by the order of the High Court made on 8 March 2001 and 12 November 2007 respectively.

[3] During the hearing plaintiff has called two witnesses. They were the plaintiff's managing director (PW1) and the former senior manager for operations and services (PW2). The 2nd defendant's sole witness was their general manager.

Facts Of The Case

[4] The brief facts are that the plaintiff had entered into a Car Park Management Agreement dated 15 August 1998 (the management agreement) with the hotel to manage, control and operate the hotel's car park. Under the management agreement plaintiff was to manage the hotel's car park for three years commencing from 1 August 1998 until 31 July 2001 and be paid a

fixed monthly sum of RM18,000 and also an incentive payment equivalent to 1% of the monthly net operating proceeds received from the hotel's car park. In return, the hotel would receive the money collected from the users of the hotel's car park.

[5] By an agreement dated 20 October 1998, the 2nd defendant purchased the Hotel Property from Crescent Hotels Sdn Bhd (CHSB) as beneficial owner of the Hotel Property and Punca Makmur Sdn Bhd (PMSB) as the registered owner of the Hotel Property. After the completion of the agreement in March 1999, the 2nd defendant by letter dated 16 June 1999 gave notice to the plaintiff to vacate and handover the hotel's car park within 14 days on or before 30 June 1999. Plaintiff took issue with the notice to vacate. Plaintiff, however, vacated the car park premises but under protest.

Plaintiff's Case

[6] The basis for the plaintiff's claim is that the 2nd defendant is bound by the management agreement. For this plaintiff relied on cl. 18(iv) of the management agreement, 2nd defendant had notice of the plaintiff's occupation and management of the hotel's car park prior to their purchase of the Hotel Property, and the 2nd defendant by their conduct accepted that they were bound by the management agreement and thus estopped from denying they were not bound by it.

Clause 18(iv) Of The Management Agreement

[7] Clause 18(iv) of the management agreement stipulates as follows:

> The expression "the Company" shall include the successors-in-title and the assigns of the Company and the expression "the Manager" shall include the successors-in-title and the permitted assigns of the Manager.

[8] It was submitted for the plaintiff that since 2nd defendant was the new owner of the Hotel Property therefore the 2nd defendant is the successor-in-title within the meaning of the management agreement. Evidence before the court was that the previous owner of the Hotel Property before the 2nd defendant acquired it was CHSB/PMSB. The 2nd defendant then purchased the Hotel Property from them. This is evidenced by an agreement dated 20 October 1998. Being the purchaser and new owner of the Hotel

Property the 2nd defendant cannot be the successor-in-title as provided for in the management agreement. The 2nd defendant can be regarded as successor-in-title if 2nd defendant has taken over CHSB or PMSB, but this is not so in this case.

[9] PW1's evidence that cl. 18(iv) was inserted by mutual agreement between the plaintiff and the 1st defendant in order to bind subsequent owners who purchased the hotel cannot be accepted as evidence of the meaning of the said clause. This is because there is no evidence that CHSB/PMSB had discussions with the plaintiff on this and expressly inserted this clause for the purpose of binding subsequent owners of the hotel. If that was the case then the words "subsequent owners" could and would have been used.

[10] Further, the management agreement is an agreement by the plaintiff to provide services to manage and operate the car park at the hotel. It is not a tenancy agreement. The management agreement does not accord or confer upon the plaintiff any rights of exclusive possession or any rights whatsoever over the Hotel Property. The rights of the plaintiff were purely contractual and the contract was entered into with CHSB/PMSB and not the 2nd defendant. Thus the words "successor-in-title" in cl. 18(iv) cannot be interpreted in the same manner as it would be interpreted if the said clause was found in a sale and purchase of land or property or in a tenancy agreement. The management agreement ought to be construed as a covenant that does not touch or concern the land and is not to be regarded as conferring any form of proprietary or possessory rights over the Hotel Property.

Notice Of The Plaintiff's Occupation And Management Of The Hotel Car Park

[11] Evidence adduced by the plaintiff was that sometime in April 1999 after they became aware that the hotel has been bought over by the 2nd defendant their Senior Manager for Operations and Services (PW2) met with a representative of the 2nd defendant to inform them about the existence of the management agreement. This was followed up with a letter dated 23 June 1999 (p. 63 of bundle of documents marked A).

[12] In the submission learned counsel for the plaintiff stated that since the 2nd defendant's sole witness (DW1) had admitted that prior to the purchase of the Hotel Property the 2nd defendant inspected the Hotel Property including the Hotel Car Park, so the 2nd defendant was fully aware of the fact that the Hotel Car Park

was managed and operated by the plaintiff. Hence it was submitted it would be unjust and inequitable for the 2nd defendant to argue that they were not aware of the management agreement and that they were to take the Hotel Property free from the management agreement.

[13] Learned counsel for the 2nd defendant submitted that the 2nd defendant entered into the sale and purchase agreement to acquire the Hotel Property from CHSB/PMSB. In the sale and purchase agreement it was provided that the Hotel Property was sold with vacant possession subject to the continued rights of use, occupation or possession under certain leases or contracts. And in the said agreement, only one contract ie, the concession agreement dated 1 January 1998 between Marriott International Hotels Inc and SPA Elixir Sdn Bhd was set in the Appendix. The said agreement also provided that the Hotel Property was sold and transferred free from encumbrances of any kind except certain encumbrances as set out in the Appendix, and in the Appendix only one encumbrance ie, a lease in favour of Tenaga National Berhad registered on 24 March 1997 was stated. The management agreement was not one of the contracts that was listed in the said agreement to be taken by the 2nd defendant. Further the management agreement was never at any time assigned or novated by CHSB/PMSB to 2nd defendant. It was thus submitted that there was no privity of contract between the plaintiff and the 2nd defendant. Plaintiff contracted with CHSB/PMSB and could not now impose the terms of the management agreement upon the 2nd defendant.

[14] I agree with the above submission by the learned counsel for the 2nd defendant. The 2nd defendant did not purchase the Hotel Property from CHSB/PMSB subject to the management agreement. There was also never any agreement that the 2nd defendant would assume the obligations of CHSB/PMSB under the said sale and purchase agreement. Thus 2nd defendant cannot be bound by terms of the contract which they never entered into or have agreed to be bound by.

[15] It was also submitted although 2nd defendant had taken complete control of the Hotel Property on or around March 1999, they had done nothing to the plaintiff until June 1999. Plaintiff was still managing the Hotel Car Park between March till June 1999. During this period, if the 2nd defendant had any right to evict the plaintiff on the basis that they were not bound by the management

agreement, they should have acted upon it. Since 2nd defendant had done nothing it was submitted that the 2nd defendant by their conduct accepted that they were bound by the management agreement and thus estopped from saying they were not bound by it.

[16] Through DW1, 2nd defendant had made known why only in June 1999, notice to vacate and hand over the Hotel Car Park was given to the plaintiff. I am of the view the explanation given as to what the 2nd defendant was doing after taking over the properties following the sale and purchase agreement of 20 October 1998 is reasonable. The three months' delay in issuing the notice to vacate cannot be taken to be that the 2nd defendant was estopped from saying that they were not bound by the management agreement.

[17] An argument on estoppel by conduct on the part of the 2nd Defendant can be subscribed if it is shown that the 2nd defendant had accepted the collections from the plaintiff and the 2nd defendant had paid the plaintiff the monthly "fixed expenditures". The evidence before the court was that monies collected by the plaintiff for the period December 1998 to June 1999 were deposited into the bank account of the former owner ie, one of the companies of Taiping Consolidated Bhd group of companies. Also during that period of time the plaintiff did not receive the monthly "fixed expenditure". In the light of these evidence the plaintiff have conducted themselves as if they were bound to pay the former owner, thus they should be the one to be estopped.

Whether the Management Agreement is the Tenancy Agreement

[18] Learned counsel for the plaintiff has submitted that based on the various provisions in the management agreement the plaintiff had exclusive possession of the Hotel Car Park. This submission is contrary to what had been testified by PW1. In cross-examination PW1 agreed that the management agreement was not a tenancy agreement; the plaintiff did not have exclusive possession of the Hotel Car Park, and the plaintiff's presence in the Hotel Car Park was only for the purpose of operating the car park and collecting fees on behalf of the owner of the Hotel. PW1 also agreed that the management agreement was an agreement to provide services to manage and operate the Hotel Car Park.

[19] Also in the management agreement it is expressly provided that the plaintiff's appointment as the manager was to manage, control and operate the car park for the hotel.

[20] Counsel for the 2nd defendant had submitted that there was no clause in the management agreement conferring exclusive possession of the car park. Clause II was not in regard to exclusive possession but it concerned restriction of sub-letting and similar activities. Also there was no provision on rental since cl. 3.1 concerned the collections of the car park charges for and on behalf of the hotel owner. Hence it was submitted that the plaintiff's job to collect the parking fees for the hotel owner could in no way amount to rental.

[21] Based on the aforesaid, the submissions for the plaintiff that the management agreement was a tenancy agreement is unsupported by evidence. Having come to this conclusion I need not go any further to consider the plaintiff's submission that plaintiff had an equitable interest in the land (ie, a tenancy coupled with equity) and equitable estoppel.

A Positive Covenant Cannot In Law Be Enforced Against A Purchaser

[22] This point is taken up in the event that the management agreement ought to have been construed as conferring the plaintiff rights over the Hotel Property itself and is regarded as a covenant touching or concerning the land.

[23] On this matter learned counsel for the 2nd defendant had referred to the case of *Rhone And Another v. Stephens* [1994] 2 All ER 65 where the House of Lords has held:

> A positive covenant was not enforceable at common law because a successor in title was not a party to the contract, and, although breach of a negative covenant which restricted the user of land or the exercise of other rights in connection with land could be prevented or punished in equity, the burden of positive covenants did not run with the freehold and was not enforceable in equity.

[24] In the present case, the management agreement is a positive covenant since it compels the contracting party to allow the plaintiff to exercise certain rights over the Hotel Property and obliges the contracting party to make payments to the plaintiff for services rendered. Being a positive covenant it cannot be enforced on the

2nd defendant because there is no privity of contract between the plaintiff and the 2nd defendant. To enforce the management agreement on the 2nd defendant would tantamount to enforcing an obligation against them who has not covenanted to do so. This would contradict the common law rule that a person cannot be made liable upon a contract unless he was a party to it.

Conclusion

[25] Based on the aforesaid, I am of the view that the 2nd defendant is not bound by the terms and conditions of the management agreement between the plaintiff and the hotel. The plaintiff was thus not wrongly evicted from managing the Hotel Car Park.

[26] Accordingly the plaintiff's claim is dismissed with costs.